OWARDS A NORMATIVE BASIS OF THE DOCTRINE
OF CONSIDERATION

By

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CONSIDERATION

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Abstract

This paper reviews both the law and the theoretical accounts of the doctrine of consideration with a view to look for a normative, consistent and public basis of it. The thesis argues that such a basis can only be found by justifying it as what it is instead of considering it as a proxy for something else. The most promising justificatory account of the doctrine should look at its main features and try to make sense of them in consistency, instead of putting up assumption before analysis.
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>Introduction</td>
<td>4</td>
</tr>
<tr>
<td>II.</td>
<td>The law of the Doctrine of Consideration</td>
<td>6</td>
</tr>
<tr>
<td>2.1</td>
<td>Nexus</td>
<td>6</td>
</tr>
<tr>
<td>2.1.1</td>
<td>Moves from the claimant</td>
<td>6</td>
</tr>
<tr>
<td>2.1.2</td>
<td>Requested by the promisor and given in return for the promise</td>
<td>7</td>
</tr>
<tr>
<td>2.1.3</td>
<td>Past consideration is not good consideration</td>
<td>7</td>
</tr>
<tr>
<td>2.1.4</td>
<td>Qualitatively different from the promise</td>
<td>9</td>
</tr>
<tr>
<td>2.2</td>
<td>Value in the eye of the law</td>
<td>9</td>
</tr>
<tr>
<td>2.2.1</td>
<td>Legal benefit</td>
<td>9</td>
</tr>
<tr>
<td>2.2.2</td>
<td>Valuable but no need to be adequate</td>
<td>9</td>
</tr>
<tr>
<td>2.2.3</td>
<td>Undertakings considered valueless in law</td>
<td>10</td>
</tr>
<tr>
<td>III.</td>
<td>Fried’s Criticism</td>
<td>12</td>
</tr>
<tr>
<td>IV.</td>
<td>The Major Justifications for Consideration</td>
<td>15</td>
</tr>
<tr>
<td>4.1</td>
<td>Fuller’s Formal Justification</td>
<td>15</td>
</tr>
<tr>
<td>4.2</td>
<td>Atiyah’s “Realist” Justification</td>
<td>18</td>
</tr>
<tr>
<td>4.3</td>
<td>Gordley’s Teleological Justification</td>
<td>20</td>
</tr>
<tr>
<td>4.4</td>
<td>Benson’s Transfer Theory</td>
<td>25</td>
</tr>
<tr>
<td>4.4.1</td>
<td>A Summary</td>
<td>26</td>
</tr>
<tr>
<td>4.4.2</td>
<td>A Critical Review</td>
<td>34</td>
</tr>
<tr>
<td>V.</td>
<td>The Two Main Understandings of the Doctrine</td>
<td>41</td>
</tr>
<tr>
<td>5.1</td>
<td>The Teleological approach</td>
<td>41</td>
</tr>
<tr>
<td>5.2</td>
<td>The Non-Teleological approach</td>
<td>43</td>
</tr>
<tr>
<td>5.2.1</td>
<td>Autonomy</td>
<td>46</td>
</tr>
<tr>
<td>5.2.2</td>
<td>Reciprocity and Mutuality</td>
<td>48</td>
</tr>
<tr>
<td>5.2.3</td>
<td>Corrective Justice and Equality</td>
<td>51</td>
</tr>
<tr>
<td>VI.</td>
<td>Conclusion</td>
<td>55</td>
</tr>
<tr>
<td></td>
<td>BIBLIOGRAPHY</td>
<td>57</td>
</tr>
</tbody>
</table>
I. Introduction

It is the intention of this paper to search for a normative, consistent and public basis for the doctrine of consideration. Moreover, I will argue that such a basis can only be found by looking at the substantive features of the doctrine, by identifying its underlying organizing ideas, and by justifying it as what it is instead of considering it as a proxy for something else. I am not arguing that such a basis can certainly be found, but as a starting point, I believe this approach is promising.

The doctrine of consideration is a fundamental rule of common law contract (although not the case in civil law). According to this doctrine, with the exception of contract under seal, each party to a valid contract must do or agree to do something in exchange for the undertaking of the other party. The act or return promise from the promisee as *quid pro quo* for the promise made by the promisor is called consideration. The absence of consideration will in principle render a promise unenforceable. Therefore, a promise to make a gift—a donative promise—and a gratuitous promise to compensate another for past services are not enforceable. Moreover, it is arguable that a promise without consideration does not constitute a contract at all, as common law judges usually present consideration as a substantive requirement of contract formation. It leads us to wonder whether there is a substantive justification for the doctrine, which can explain why consideration should be required, in and of itself and not merely as a proxy for something else that the law cares about.¹

It is said that consideration is both central and necessary to contractual liability in a sense that the law postulates an intrinsic link between the requirement of consideration and the enforceability of wholly executory contract according to the expectation principle. On this view, consideration is definitive and distinctive of contract.² However, over the last several

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¹ This question has been repeatedly asked by contract theorists, see for e.g. Stephen A. Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) 231.
decades scholars have repeatedly criticized the doctrine of consideration as artificial, unnecessary, internally inconsistent, or dysfunctional—in short, as an historical accident without rational foundation—to the point that some have reached the conclusion that contract law’s rationality and moral acceptability would be enhanced by its abolition. The proposed thesis is to critically examine both the critical and justificatory accounts of the doctrine, in an effort to identify the difficulties and prospects in justifying the normative plausibility of consideration. It is the thesis of this paper to present my understandings of a promising approach to justify the doctrine of consideration and what is yet to be developed.
II. The law of the Doctrine of Consideration

It is a common conception at common law that a simple undertaking to confer a benefit on another may be unenforceable even if all the formation requirements are met: offer, acceptance, certainty, and the intention to create a legal relation. This is because common law traditionally refuses to enforce bare undertakings or agreements (also called a *nudum pactum* or gratuitous promise). To be enforceable, an undertaking must be accompanied by an additional element; in general, this will be the presence of consideration. Roughly speaking, consideration means that each party has given something in exchange for the other’s undertaking. The requirement of consideration is thought as one of the distinctive features of the common law, which sets itself apart from other legal systems, in particular the European continental civil law systems. Thus, English law is particularly thought to be concerned with the enforcement of bargains, and not simply agreement. This view is subject to examination in this paper, so is its opposite, which is the belief that law should be concerned with the enforcement of pure wills. Before turning in to that extensive discussion, we shall first review the law of the doctrine of consideration.

It is generally agreed that consideration is the ‘agreed equivalent and inducing cause of the promise’,
\[3\] then where $X$ undertakes $X^*$ in exchange for $Y$ undertaking $Y^*$, two elements must be satisfied:
\[4\] nexus and value. Let me elaborate.

2.1 Nexus

2.1.1 Moves from the claimant

Consideration must be something that genuinely originates from the promisee and independent of the promise. However, it does not matter to whom that the consideration moves. Thus, while consideration must move from the promisee, it need not move to the promisor. This requirement has two meanings: firstly, the something of value in return for the

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promise shall not come from a third party;\textsuperscript{5} secondly, consideration must be independent of the promise and not merely the effect of it. In other words, it must be possible to view the substance of the thing of value as something that is with the promisee and that the promisee might in principle have dealt with in some other way independently of and prior to that promise. By way of an example of something that does not satisfy this requirement of independence, a motive of, thanks from, or the feeling of gratitude or satisfaction of the promisee, is not independent of the promise, but merely a response or effect of the promise. Thus, they do not constitute valid considerations.\textsuperscript{6}

2.1.2 Requested by the promisor and given in return for the promise

In particular, there will be no consideration if the promisee incurs a detriment or confers a benefit in reliance on, rather than in return for, the promise. The consideration must be given as a \textit{quid pro quo} for the promise in the sense that promise and consideration must be mutually inducing. In \textit{Combe v. Combe} (1951), a husband promised to pay his wife £ 100 a year on their divorce. The husband failed to make any of the payments. Six year later, the wife sought to enforce the promise on the basis that she had given consideration for it by not applying for maintenance. The court of appeal rejected this because the husband had not requested her to do this. Her forbearance was resulted from his promise to pay but was not given in return for it. This rule, however, is not a strict one. Sometimes, even when the undertaking of the promisee is not explicitly requested by the promisor, so long as it can be shown that both the promise and the promisee’s undertaking are integral and correlated parts of one single transaction, the nexus would be established.\textsuperscript{7}

2.1.3 Past consideration is not good consideration

Since consideration must be given in response to promise, it cannot logically include something given or done before the promise was made. Because, in such a case, there is no

\textsuperscript{5} \textit{Tweddle v Atkinson} (1861) 1 B & S 393: Promises made at the wedding of a couple by both parents (father of bride and father of groom) to pay a sum of money are not enforceable by the couple as claimant.

\textsuperscript{6} This point is intertwined with requirement of value, which is discussed in more detailed in the next subsection.

\textsuperscript{7} Mindy Chen-Wishart, \textit{supra} note 4.
contract, but merely a gift from the promisor that was provoked by another gift from the promisee. They are, in fact, two independent processes not jointly connected. To be specific, consideration may be past when its performance pre-dates the promise given, or, when it already corresponds with a reciprocal promise thus it cannot be the consideration to a further promise from the same promisor.

However, the exact order of events will not be decisive if the court is satisfied that the promisor’s promise and the promisee’s past action are, in fact, part of the same overall transaction. This is the major gist of the exception to the past consideration rule, the doctrine of implied assumpsit. An early example is Lampleigh v. Brathwait (1615) where B, who was under sentence of death, requested L to ride to Newark to obtain a pardon from King James I. L did so. B’s subsequent promise to pay L £1,000 was held to be enforceable. A more detailed set of rules was laid down in Pao On v. Lau Yiu Long; the Privy Council held that a promisee wishing to invoke the exception must show that: a. he performs the original act at the request of the promisor; b. it was clearly understood or implied between the parties at the time of the request that the promisee would be rewarded for doing the act; and c. the eventual promise must be one which would have been enforceable if made at the time of the act.

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8 Ibbetson mentioned that in Medieval time, even in case where gift is given in moral expectation of a return gift, they were still considered gift and gratuitous, not contract. It is arguable that the notion of exchange is not the characteristic feature of contract, rather, it is the idea of reciprocity that is unique to contract thus shall be its defining feature. As Ibbetson points out, ‘In the modern world the circulation of goods is achieved largely through contracts, most obviously the contract of sale. The early medieval European world was very different, for, although sales did occur, the transfer of property by way of gift was of far greater importance…. These gifts were not simply acts of altruism: on the contrary, the giving of a gift created a tension between the parties that could be resolved only by the original recipient making a counter-gift.’ However, the ‘a gift demand a gift’ relationship is also reciprocal and result in exchange, however, it is not contract. ‘The impetus towards reciprocity might have been very strong, but we must not lose sight of the fact that the stimulus to make the counter gift came from the original recipient, not the donor; to request a counter gift would undermine the voluntariness of the original gift and so dissolve the whole transaction. It follows that the true difference between a gift and a contract was not that the one was gratuitous and the other reciprocal. Both involved reciprocity, but in gift the nature and extent of the reciprocation were determined by the recipient, whereas in a contract it was a matter of negotiation.’ See David J. Ibbetson, An Historical Introduction to the Law of Obligation (Oxford: Oxford University Press, 1999) 4. It seems that contract is established only when consideration and promise are determined by both parties, and as parts of one single transaction.

9 See Eastwood v. Kenyon (1840).
10 See Roscorla v. Thomas (1842).
11 Also see Hunt v. Bate (1568) and Shidenham v. Worlington, Mindy Chen-Wishart, supra note 4, 128-131. It is doubtful whether such a case is distinguishable from the old “a gift demand a gift’ relationship. Moreover,
2.1.4 Qualitatively different from the promise

It is also stated that consideration should be qualitatively different from the promise. For example, X cannot enforce Y’s promise to pay $500 in consideration for X paying $1. In such a case, it is no different from Y promising $499 to X gratuitously; therefore, no consideration can be found.

2.2 Value in the eye of the law

According to the common law, a promisee only furnishes valuable consideration when certain conditions are met. Something of value is given only when the undertaking of the promisee constitutes a legal benefit to the promisor or a legal detriment to himself. However, the definition of value is very flexible, encapsulated in the maxim that ‘consideration must be sufficient but it need not be adequate’. This flexibility often obscures the precise scope of valid consideration. Let me elaborate.

2.2.1 legal benefit

Benefit received or detriment suffered may be understood in the factual sense of value in the eye of the parties. However, the courts have traditionally, although not consistently, insisted on benefit or detriment in the legal sense—valuable in the eye of the law. This finds the sharpest application in the traditional rule that the promisee confers no legal value by performing his pre-existing contractual duty, however much this may occasion factual benefit to the promisor and factual detriment to himself. Nevertheless, in Williams v. Roffey Brothers (1991), the court recognized factual benefits to promisor as valid consideration, which complicate the legal benefits or detriment rule.

2.2.2 Valuable but no need to be adequate

some cases that were previously dealt with under the doctrine of implied assumpsit are now more appropriately dealt with by the principle of unjust enrichment; the difference is that liability would be measured by the objective value of the benefit received rather than the amount promised. This could be explained as a non-contract relation.

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12 Benefits and detriments need not necessarily co-present.
13 Mindy Chen-Wishart, supra note 4, 133.
On the one hand, consideration need to be valuable; on the other hand, it is an accepted rule that the courts will not enquire whether adequate value has been given in return for the promise or whether the agreement is harsh or one—sided. In particular, court does not require an exchange of equivalence. This rule is encapsulated in the maxim that ‘consideration must be sufficient but it need not be adequate’. The provision of a nominal consideration will suffice. In *Currie v Misa* (1875) LR 10 Ex 153, it is stated that a valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. In *Chappell v Nestlé*, Lord Sommervell stated that “[a] contracting can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn.” 14 Here, the doctrine of consideration does not seem to serve the purpose of distinguishing gratuitous promises from bargains. 15

2.2.3 Undertakings considered valueless in law

Although consideration need not be adequate and may exist even if it is trivial, there are certain restrictions identifiable. Firstly, the mere motive or desire of the promisor to confer a benefit does not serve as a legal benefit to him 16. This is a clear rule, and could be linked back to the nexus requirement that consideration must be something comes from the promisee. Moreover, intangible benefits are generally insufficient. Thus a father’s promise in consideration of a son’s ‘natural love and affection’ (*Bret v. JS* (1600)) or the son’s promise

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14 Also see *Bainbridge v. Firmstone* (1838) a promisee briefly lent out two boilers to the promisor for weighing in exchange for the promise to return the boiler in the same condition; and *Haigh v. Brooks* (1839) a promise surrendered a document thought to be a guarantee but actually worthless in exchange for a promise to pay certain bills.

15 Nominal consideration is often understood as the clearest indication that consideration is reducible to formality, since such minimal undertaking requested by the promisor shows that he intended his promise seriously and intended to give the promisee a legally enforceable right. See P.S Atiyah, *Essays on Contract* (Clarendon Press, 1986), 194.

16 See *Thomas v. Thomas* (1842), and Mindy Chen-Wishart ,supra note 4, 138.
not to complain (*White v. Bluett* (1853)) is not considered valuable consideration.\(^{17}\) Thirdly, the something of value that is given must not already have been the object of a prior agreement. In other words, the promisor must not already have been entitled to the ‘consideration’. This rule is known as the pre-existing duties rule. An Example is provided by *Roscorla v. Thomas* (1842) 3 QB 234: C bought a horse; afterwards D warranted that the horse was "sound and free of vice"; the horse turned out to be vicious; the warranty was not binding since it is not supported by a valuable consideration, as the horse had been paid for before the warranty was made. \(^{18}\) However, performance of pre-existing duties might be considered valuable consideration in the name of “practical benefit”. In *Ward v. Byham* (1956), where a mother’s promise to see that her child is “well looked after and happy” was valid consideration for the father’s promise to contribute towards the child’s maintenance, Lord Denning LJ attacked the general rule. He conceded that the mother did no more than she was already obliged to do under a legal duty (hence suffer no legal detriment). However, he shifted the focus towards the presence of factual benefit to the promisor. This emphasis was repeated by Glidewell LJ in *William v. Roffey Bros*, where factual benefit resulted from the performance of pre-existing duties was regarded as good consideration. However, the remedy was measured by the value of reliance, instead of the promised undertaking of the promisor. \(^{19}\)

\(^{17}\) However, this rule was contradicted in several instances, in *Dunton v. Dunton* (1892) where a wife’s promise to behave respectfully was accepted as good consideration.

\(^{18}\) Also see *Stilk v Myrick* (1809) 2 Camp 317 where two sailors jumped ship and wages were shared between others – a case of lack of consideration. Restriction of this rule can be found in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1: a promise to carry out work already owed under a contract in a timely manner may be good consideration if promisee received practical benefit.

\(^{19}\) Therefore, it is arguable that *Roffey* was in fact an unjust enrichment case.
III. Fried’s Criticism

The doctrine of consideration has been controversial. Some theorists believe that consideration is necessary to contractual liability in a sense that the law postulates an intrinsic link between the requirement of consideration and the enforceability of the wholly executory contract according to the expectation principle. However, over the last several decades scholars have repeatedly criticized the doctrine of consideration as artificial, unnecessary, internally inconsistent, or dysfunctional—in short, as an historical accident without rational foundation—to the point that some have reached the conclusion that contract law’s rationality and moral acceptability would be enhanced by its abolition.

The standard criticism of the doctrine of consideration comes from Fried, which is shared by many contract law theorists. 20 Fried’s criticism includes the following arguments.

First of all, Fried maintains that the doctrine of consideration leads to a wrongful and problematic conclusion that a promise is enforceable only in so far as it is necessary to prevent one party from deriving a one-sided benefit. He argues that the prevention of unjust enrichment cannot be the basis for enforcing contract. Because that would suggest that the law of contract is not concerned with enforcing promises or contractual terms, but with compensating harms suffered through reliance. The implication can be destructive to the very basis of contract law, and reduces contract law to tort law.

Secondly, Fried claims that there is no consistent or stable basis to explain the doctrine of consideration, and its key features are in fact contradictory. On the one hand, the doctrine of consideration shows that contract law is concerned with the idea of exchange or bargain. On the other hand, the consideration rule is not interested in the adequacy of promise. The goodness of exchange is not something that law judges; the law only judges whether there is an ostensible exchange. Fried insisted that these two propositions are contradictory, because

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they seek to prioritize bargains and to protect the freedom of contract at the same time. He then goes on to list case law\footnote{Hamer v. Sidway, 124 N.Y. 538, 27 N.E. 256 (N.Y. 1891): money in exchange for a promise not to smoke is enforceable since law will not inquire into actual motives, as long as there is an ostensible exchange. However, in Chappell v. Nestlé, [1960] AC 87 money in exchange for pepper corn is not enforceable, because the court considered it a pretense. In that case we seem to look at the substance and motive. All in all, the idea of exchange is very abstract, and its application does not seem consistent and predictable.} that proves that it is impossible to reconcile the two features and that they inevitably lead to inconsistent legal reasoning. On the one hand, feature ‘b’ suggests that law does not inquire into goodness of exchange, affirms the liberal principle that the free arrangement of rational persons should be respected. On the other hand, feature ‘a’, by limiting the enforceable class of arrangements to bargains, holds that individual self-determination is not a sufficient ground of legal obligation, which implies that collective policies can after all override individual judgment.

Thirdly, Fried claims that, in fact, many enforceable contracts do not involve consideration, i.e. promises to keep an offer open, to release a debt, to modify an obligation, and to pay for a past favor.

Lastly, it is argued that the doctrine of consideration results in injustice in two ways. By denying the enforceability of serious intended promises and the recourse against a failure to perform such promises, the doctrine of consideration does injustice to the promisee. Furthermore, consideration’s open-ended nature leads to unpredictable and unclear applications.

\footnote{Hamer v. Sidway, 124 N.Y. 538, 27 N.E. 256 (N.Y. 1891): money in exchange for a promise not to smoke is enforceable since law will not inquire into actual motives, as long as there is an ostensible exchange. However, in Chappell v. Nestlé, [1960] AC 87 money in exchange for pepper corn is not enforceable, because the court considered it a pretense. In that case we seem to look at the substance and motive. All in all, the idea of exchange is very abstract, and its application does not seem consistent and predictable. We argue that the term ‘bargain’ can better bring out its characteristics. So for an exchange to be a bargain or reciprocal conventional inducement, a transaction has to be either intended to be a bargain (giving up the choice to smoke) or belong to a type that applies generally to bargains about. However, this argument alone cannot explain some of the situations: Exclusive use of a manuscript for a chance to revise it: not enforceable because of lack of mutuality (proportionality), although it fulfills the forgoing argument. Widow repays debt in exchange for the cancelation of worthless debt. Not enforceable, due to lack of consideration, although the widow believes “clearing her husband’s reputation” is something valuable. Promise to pay off debts that are not enforceable due to bankruptcy and passage of time: enforceable, prior obligation is sufficient consideration. (In contradiction with the doctrine that you cannot bargain for what you already have); promise for prior obligation: in gratitude context, some are enforceable while some are not. Cases about: debtor promise relief of interests if creditor can repay overdue debt immediately: not enforceable. These cases show that bargain theory cannot offer a consistent set of principles which all the cases follow, nor give justifications. It might be argued that the third premise is added: consideration needs to be fresh, and one cannot sell the same thing twice. But still it cannot reconcile the different outcome of all the cases.}
Observations such as Fried’s, together with the fact that the civil law system seems to function perfectly well without the consideration requirement, consideration rule is argued as best regarded as an indefensible historical anachronism. Consequently, a successful justificatory account of the doctrine should be able to identify a normative and consistent basis of the doctrine. In the second part of the paper, I will review the major accounts defending the doctrine of consideration against the background of Fried’s criticism.
IV. The Major Justifications for Consideration

In this section, I will briefly review four justificatory accounts for the doctrine of consideration: Fuller’s formal justification, Atiyah’s realist justification, Gordley’s teleological approach and Benson’s transfer theory. For ease of exposition, these justifications are analyzed separately, but they can be and often are combined.

4.1 Fuller’s Formal Justification

As the best known justification for the doctrine of consideration, Fuller argues that the consideration rule has an essential formal function. On this view, the doctrine is justified on similar grounds as those that justify seal and other formality requirements. Specifically, the consideration rule serves the same evidentiary, cautionary and channelling functions that formality often serves. At the same time, Fuller also suggests a substantive justification for the doctrine of consideration—social and economic consideration. He employs a two-step analysis. Firstly, he asks what sort of voluntary transactions are of sufficient substantive importance from a social economic perspective. The answer is economic exchange because it is the principal type of voluntary transactions that law should enforce. And then he asks what would be the most efficient tool to single out these enforcement-worthy transactions. The answer is consideration, which satisfy both the formal and substantive purposes of enforcement. His thesis is that the doctrine of consideration is justified only to the extent that it properly singles out those non-formal voluntary transactions that satisfy the formal and substantive criteria.

Accordingly, he claims that half-executed contract presents the strongest case for legal enforcement, because it entails unjust enrichment on one side and reliance on the other, so in itself satisfies the substantive criterion of social and economic importance; in addition, in the context of half-executed contract, the delivery and the acceptance of the reciprocal

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22 Fuller’s justification can be and has been adopted by contract theorists who in other respect have little in common; see e.g. Eisenberg, Posner, Goetz and Scott; Barnnet.
undertaking from the promisee involve a kind of natural formality, which satisfy the evidentiary, cautionary and channeling purpose of legal formality. Accordingly, wholly executory contract is less deserving for enforcement than half-executed contract. The same logic explains the law’s refusal to enforce gratuitous and unrelied-on promises. In terms of the substantive basis of contractual liability, gratuitous contract does not present an especially pressing case for the application of the principle of private autonomy, especially if we bear in mind the cost of legal intervention. While an exchange of goods is a transaction which conduces to the production of wealth and the division of labor, a gift is a sterile transmission. Moreover, there is neither reliance nor unjust enrichment, which could alternatively serves as substantive basis for enforcement. Lastly, from the formality standpoint, there is a lack of evidentiary and cautionary safeguard; as to the channeling function, we may observe that the promise is made in a field where intention is not naturally canalized; meaning that it is naturally thought that gift is usually considered unenforceable.  

However compelling Fuller’s reasoning is, his account of justification was criticized in the many ways:

Firstly, Fuller suggests that consideration is needed because it serves several, often convergent policies which take no consideration of coherency, but none of these policies is either necessary or sufficient. In that sense, as Fried points out, Fuller’s reasoning makes consideration an awkward tool because it serves none of its proposed purposes well, and each of them can be better served by a special tool (e.g. an archaic institution like the seal might serve these functions better). With respect to its function of singling out economically efficient promises, Fried suggests that the doctrines of unfairness and unconscionability will replace consideration as a better determinant of whether or not to enforce certain contracts.

Secondly, in Fuller’s thesis, the doctrine of consideration is justified only to the extent that it properly singles out those non-formal voluntary transactions that satisfy the substantive

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23 See generally Lon L. Fuller, “Consideration and Form” (1941) 41 Colum. L. Rev. 878-902.
criteria. Therefore, half-executed contract presents the strongest case for legal enforcement, while wholly executory contract is less strong than the half-executed contract. Accordingly, he rejects the idea that the consideration of an immediate physical act is of the same significance as the consideration of a promise to act. However, the law does not reflect Fuller’s view. In the first place, law does not require conferring of tangible benefits for a consideration to be valid; a return promise would suffice. Moreover, the law does not prioritize half-executed promises, even with unilateral contracts (although by definition unilateral contracts need to be partly executed, they do not need to be partly executed exchanges in a sense that the two undertakings do not have to be of similar value) — the unilateral contract does not single out or privilege transactions that satisfy Fuller’s main substantive criteria.  

Thirdly, equating the role of consideration with formality is explicitly and decisively rejected by law. The evidentiary, cautionary, channeling functions cannot sufficiently define and interpret the substance of consideration and its application, because the law does not suppose that parties who request or give consideration actually intend consideration as a way of giving legal effect to their wishes or as a formality. Otherwise the court would make the case of money for peppercorn enforceable as long as parties intend them to be substitutes for a seal.  

Moreover, as Benson points out, all three functions of formality seem to suggest that consideration needs to be tested subjectively. It needs to be channeling one’s mind or intention thus requires that each party understands and appreciates from his or her own standpoint of legal significance. However, the Law views consideration objectively, from the standpoint of the other party and the circumstances. Although Fuller tries to justify his argument of consideration as substitute for formality by invoking nominal consideration, saying that as long as there is something valuable given by the promisee, however small or

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24 Peter Benson, *supra* note 2, 163-168.

indeterminate the value is, it is a valid consideration. As a matter of fact, even if nominal consideration is intended by parties to be “formal” or “evidentiary” or “channeling”, it would not be considered consideration since it cannot fulfill the requirement that “reasonably something that the other party could possibly wants or needs”.26

Lastly, Fuller’s justification is internally contradictory. On the one hand, as a legal formality, consideration is a mechanism that can make a pure gratuitous promise enforceable; on the other hand, consideration makes a promise distinguishable from gratuitous. Because, Fuller’s reasoning on the substantive basis of consideration, in fact, suggests a qualitative difference between gratuitous promises and promises for consideration. As he contends that agreements accompanied by consideration are socially-productive while a gift is a sterile transmission. Furthermore, Fuller’s innovation of form tells us nothing about what he considers the defining features of any voluntary transaction, which law considers as right altering legal relation. We need to know, in the first place, such right altering legal relation is possible and conceivable. Henceforth, we need to show how a promise accompanied by a reciprocal consideration, unlike gratuitous promise, can create entitlement and obligation at contract formation; otherwise, we cannot explain the right altering function of voluntary transactions.

4.2 Atiyah’s “Realist” Justification

It is argued that consideration functions as an umbrella or catch-all concept. Specifically, courts use (or manipulate) the rule in order to take into account a wide variety of factors for or against enforcing agreements, few of which have much to do with “consideration” in the technical or normative sense.27 The factors that courts consider when they invoke the doctrine of consideration include concerns like good faith, duress, and the protection of reliance. Patrick Atiyah is the leading defender of this approach, which is called realist approach. The realist justification is, in part, an historical explanation of law. Atiyah argues courts in the 17th and 18th century understood consideration very broadly; to say there was “good

26 Ibid.
27 Stephen A. Smith, supra note 1, 225.
consideration” simply meant that there was a “good reason” to enforce the contract. This reason might be, for example, that the promisor had a prior moral obligation to do what he promised to do or that the promisee had relied on the promise. Conversely, to say that an agreement lacked good consideration meant that there was a good reason not to enforce the promise. In the late 19th and early 20th centuries, this broad understanding of consideration underwent transformation under the influence of formalist theorists. Lawyers started to describe consideration using the technical language of reciprocal benefits or burdens familiar to lawyers today. But this view, as Atiyah points out, does not accurately describe what courts were doing then—or now. With the exception of a few courts misled by modern rhetoric, what courts were, and still are, actually doing is what they have always been doing—asking if there are good reasons to enforce the agreement. Of course, courts do not do this openly; instead, they pay lip-service to orthodox rule. The reality, however, is that they manipulate the rule or the facts so that they can find or invent consideration and vice versa.28

The biggest problem and an apparent one with the realist approach is that it does not make normative sense, and strictly speaking, it does not really serve as a defense to the doctrine of consideration; in fact, it seems more like an attack on it. The main assumption of the realist claim is that the list of “good reasons”29 under the consideration can never be closed, the doctrine of consideration could be manipulated as the judges see fit. And the only purpose of the doctrine is to serve as a residual category which by the way can always be replaced by some more specialized rules. Moreover, such an open-ended and openly discretionary test can be destructive to the whole contract law enterprise and the law’s endeavor to be clear, consistent and predictable. As Treitel points out, Atiyah’s view that consideration is merely

‘a reason for enforcement of a promise’ represents a “negation of the existence of any applicable rule of law”.  

4.3 Gordley’s Teleological Justification

Same with Fuller’s reasoning on the substantive basis of consideration, Gordley believes that contract law enforces certain agreement for the purpose of achieving a substantive end. However, the end is not maximization of wealth or welfare as a utilitarian or a modern economist would imagine it; rather, it is a very general conception of ‘good life’ in the Aristotelian tradition. He argues, Aristotle tradition presents a set of virtues such as commutative and distributive justice that everyone should respect for the ultimate end of living the life appropriate to a human being. Gordley seems to suggest that these virtues supply the backgrounds rules that may or may not respect individual choices. Some voluntary agreement entered into by contracting parties is sometimes disregarded by law because these agreements do not conform to the purpose of living a good life (e.g. un-revocable gratuitous promises made in hasty).

Gordley maintains, contract law can do its job only to the extent that the decisions of contracting parties are prudent and the distribution of wealth in a society is just. He starts his reasoning by criticizing the will theory. The will theory, as he interprets, leads to the conclusion that the parties’ promises or expression of wills are the source of their obligations; it believes in principle, the parties are obligated only to what they promised. However, law sometimes holds parties to terms on which they never expressly agreed, and law sometimes disregard terms they did agree.

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32 Ibid.
33 Ibid, 280.
In contrast to the will theory, the Aristotelian writers believe that the obligations of parties depend on, not only on their express will, but on the type of arrangement that law should respect. Further, they argue, there are two types of arrangements that law should respect: exchange and gift, which correspond to the virtues of commutative justice and liberality.

In case of exchange, commutative justice preserves the share that belongs to each, so it requires that resources exchanged be equivalent in value so that neither party’s share is diminished. In case of gift, the law only protects acts of gift that are compatible with the idea of liberality. Liberality means, not merely that a party gives away resources, but that he gives them away sensibly, as Aristotle said, giving “to the right people the right amount and at the right time”.\(^34\) In short, the rules of contract law should ensure, as far as practicable, in case of exchange, each party receives an equivalent; while in case of a gratuitous contract, that the donor behaves sensibly. Gordley seems to be arguing that the doctrine of consideration at common law is there to serve the above mentioned purpose by singling out agreements of exchange; while archaic formality tools like seal is to ensure that, in case of gratuitous promises, the donor acts sensibly\(^35\); in addition, the doctrine of unconscionability ensures that, in contract of exchange, each party’s exchanges equivalent value.\(^36\)

Gordley has not elaborated on the linkage between these virtues and the purpose of living a good life. What he did elaborate on is the roles of both the ‘choice’ itself and what people actually choose. He argues, although Aristotelians also concern about the choice itself (meaning the choosing process itself), but they emphasize more on what people actually choose to do. It is true that contract is voluntary, but contract law is not merely concerned with whether an agreement was made voluntarily. It is concerned with how, through voluntary agreement, people are able to get things that help them live a better life while being fair to others.\(^37\) Consequently, it is concerned with the value of what is being chosen. Free


\(^{35}\) For a detailed discussion, see James Gordley, supra note 32 at 298-30.

\(^{36}\) For a detailed discussion, see generally, James Gordley, supra note 34.

\(^{37}\) Ibid.
choice is good, because there is no best choice, and people should be free to make their own choice, this is a virtue too. However, this is not the only value that law is concerned about; and sometimes, certain free choices should be trumped for the purpose of “good life”. So the idea of ‘choice’ is not all that matters, it matters only when people choose rightly.

Gordley contends that modern contract theories following Kantian and Hegelian philosophies are problematic because they place a value on choice that is independent from the value of what is chosen. They do not explain why wills should be respected. Choices matters, Gordley argues, in part, because of the value of what is chosen. It is hard to see that the normative value of a choice could depend entirely on whether it is what they truly prefer or whether they choose it freely. For instance, some people choose to use drugs to commit rape. It is difficult to see how the process of choice is relevant to judge whether these choices are right or not, unless we could show that some results are substantively better. Fundamentally, if all that ultimately matters is that people prefer and whether they choose freely, there can be no criterion for what they ought to prefer or choose. Absent such criterion, it is hard to see how there could be better and worse processes for making a choice. Presumably, one should consider one’s alternatives, taking everything relevant into account. But without a criterion, one could not tell what is relevant.38 That is the reason Tomas Aquinas gave as to why there must be an end for human choice which is not itself chosen but for the sake of which choices are made. Otherwise the regress would be infinite. That is why we consider Gordley’s view teleological, because he believes that law serves a substantive end, and freedom cannot be defined without resorting to a purpose that we has to presuppose.

That is how the virtue of commutative justice and liberality comes into play in contract law. First of all, contract of exchange conforms to the virtue of commutative justice, which in turns contributes to the ultimate end of good life; because, in such a contract, each party obtains something he wants by giving something of equivalent value in return; therefore,

38 Ibid.
each party is enabled to obtain the goods and services he needs to live a good life while preserving a distribution of wealth that is just because it allows others to get what they need to live a good life. In case of contract of exchange, the law ensures that each party gets something of equivalent value to what he has given up. By doing so, the law gets to define what voluntariness is in such arrangement by making “exchange for equal value” the criterion. In case of gratuitous promise, the law only enforces those that are sensible. At the operational level, the law might enforce such a promise only when the promisor is particular likely to have acted sensibly or when he is particularly likely to have wanted the promisee to be able to demand performance as a matter of right. This reasoning seems to have explained the role of formality and could be potentially used to justify the doctrine of consideration’s role as a substitute for formality. The employment of formality techniques help achieving the substantive end of liberality, in other words, the freedom of a donor to give away something for nothing, sensibly.

Gordley’s account of teleological justification is illuminating in a sense that he demonstrates why the law in general respects the choice of contracting parties but in certain circumstances it does not. He examines in detail the deeper philosophical expression of autonomy and welfare theories, namely the philosophies of Kant and Hegel on the one hand and utilitarianism on the other. Gordley thinks that neither preference satisfaction advocated by utilitarian theorists nor autonomy principle valued by the will theorists explain why the law sometimes does not respect the voluntary choices of individuals. Further, he shows in details how the Aristotelian tradition has the normative principles and resources to illuminate both agreement and background rules. 39 Along this line, Gordley brilliantly signifies the roles of various contractual doctrines such as consideration, formality and unconsonability in

39 Peter Benson, ‘Introduction’ in Peter Benson, ed., The Theory of Contract Law: New Essays (Cambridge: Cambridge University Press, 2001), 16-17. According to the Aristotelian tradition, the parties’ obligations depend, not only on their express wills, but on the type of arrangement they enter into when they promise. In the Nicomachean Ethics, Aristotle described exchange as a type of commutative justice, which preserves the existing shares that everyone has. In another passage in the Ethics, Aristotle discuss the virtue of “liberality”: the liberal person disposes of his money wisely, giving “to the right people the right amount” Thomas Aquinas put these ideas together: when one party transfers a thing to another, either it is an act of commutative justice that requires an equivalent or it is an act of liberality.
distinguishing these two types of arrangements and their interrelationship viewed in the context of the whole contract law. Although he did not elaborate, the role of the doctrine of consideration, in Gordley’s interpretation, seems to be mainly facilitating the enforcement of the two types of arrangement and ensuring that all enforceable contractual agreements conform to either commutative justice or liberality.

As I have discussed before, Gordley’s view is teleological, because he believes that law serves a substantive end, and freedom cannot be defined without resorting to a purpose that we has to presuppose. The problem with teleological reasoning, I think, is that it ultimately encounters the difficulties of defining a higher purpose. Since the soundness of every step of a teleological reasoning depends on the legitimacy of the next higher purpose. According to Gordley, the ultimate purpose of valuing certain Aristotelian virtues is living the life appropriate to a human being. He criticizes the will theory and the 19th century scholars for taking the idea of freedom for granted. He argues, if all that ultimately matters is that people prefer and whether they choose freely, there can be no criterion for what they ought to prefer or choose. Absent such criterion, it is hard to see how there could be better and worse processes for making a choice. Presumably, one should consider one’s alternatives, taking everything relevant into account. But without a criterion, one could not tell what is relevant. That is the reason Tomas Aquinas gave as to why there must be an end for human choice which is not itself chosen but for the sake of which choices are made. Otherwise the regress would be infinite. However, teleological reasoning could falls into an infinite regress too because the determinant of good choice is a very vaguely defined idea of “good life”. This conception of good life is a peculiar one in a sense that it is a plural. It is not defined by either optimal allocation of resources or vindication of autonomous freedom, but rather a mix of the two. Gordley argues that the arrangements of both exchange and sensible donation should be respected by law because they each serve two independent but equally deserving purposes.

In this sense, there can be no coherency or unity in terms of theory. More fundamentally, Gordley did not explain why certain virtues can be the juridical basis of legal relationships, in
particular, he did not answer why serving certain purpose makes certain voluntary agreements legally enforceable. The dilemma for teleological reasoning is that it always justifies a legal phenomenon by something else. If we try to justify an existence by something else, by something that is independent of the immanent characteristics of what is to be justified, and engage in such process without an ultimate goal of achieving any kind of coherency or unity, such justificatory process triggers infinite chain-reactions, which points nowhere but inconclusive and indeterminacy. In contrast, the formalistic approach advocated by Benson and Weinrib seems a much more promising approach in validating private law as what it is, because it derives its critical perspective through abstraction, not by derivation. The validity of its justification does not depend on the correctness of those external considerations and the ultimate destination of its justificatory process is coherency and unity, which is generally determinate and predictable.  

4.4 Benson’s Transfer Theory

In contrast to the three accounts discussed above, Benson tries to provide a justification for the doctrine of consideration by taking its main orthodox features seriously, instead of questioning and rejecting them right away as Fried does. And his approach is formalistic, not teleological. He did not investigate into the “reasons” for creating entitlement, but first delineates the normative features of a purely juridical relationship and starts from there to see whether consideration embodies those features. In Benson’s words, “Throughout, our inquiry is guided by the idea of a public basis of justification.” By public basis of justification, he means a theoretical goal to develop a justificatory framework of contract that is not only coherent but also framed to be acceptable, as a matter of reason and principle, to individuals considered as legal or political personae. As a theory for contract, he sought to justify

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41 Peter Benson, supra note 2, 154.
42 Peter Benson’s account of public justification is inspired by Rawls’ public legal theory, See John Rawls, Political Liberalism 223–27 (1993) (explaining the idea of a public justification). Examples of Benson’s use of
consideration as an integral part of contract law, which shares the same legal conception, the same plausibility and justification with other contract doctrines, such as the doctrines of offer and acceptance.

He claims that the doctrine of consideration has an intrinsic value in creating entitlements and duties in contract scenario. According to his transfer theory, consideration allows the contracting parties’ interactions to be reasonably construed as a transfer of rights, thus supports the expectation principle (which in turns justifies the expectation remedy). It is argued that consideration does not prioritize economic exchange or half-executed contract. And Benson does not consider the function to substitute formality as essential to the conception of the doctrine of consideration, although it might serve such function. Let me elaborate.

4.4.1 A Summary

First of all, Benson argues that the promises supported by consideration are fundamentally different from gratuitous promises. The former is not merely the latter plus consideration or a seal, in a sense that a contract is two-sided in nature and embodies the notion of reciprocity in every aspect, while gratuitous promise is one-sided. The doctrine of consideration, by requiring a quid pro quo for the promise, provides the second side of a contract. To elaborate, Benson presents the juridical characteristics of gratuitous promises as follows: firstly, gratuitous promise is an one-sided undertaking, consisting of one act of will, not two; secondly, gratuitous promise is not possible to represent the wills of two parties as mutually inducing (even in cases where A promises to give B one million dollars, afterwards, B silently washes A’s bathroom for the rest of his life, the promise and the return act are not mutually inducing); thirdly, a gratuitous promise does not itself give promisee any right (as a result of the former two characteristics). Then Benson goes on to present the juridical features
of contract supported by consideration, which, he argues, is irreducible in concept and structure to a gratuitous promise. The features of a valid contract include: Firstly, a contract is two sided and only those agreements supported by consideration are two-sided in nature since they contains two independent, but mutually related acts of wills. As I have discussed in the first section. At common law, the nexus requirement of consideration requires that the promise and the consideration must be mutually distinct, qualitatively different and irreducible one to the other. In case where the two are just quantitatively different, law subtracts the smaller amount from the bigger and leaves the other part as a one-sided gratuitous promise. For example, X cannot enforce Y’s promise to pay $500 in consideration for X paying $1. In such a case, it is no different from Y promising $499 to X gratuitously. Accordingly, Benson observes, the primary function of consideration is to set up a second side of a contract (in addition to the promise); this reasoning justifies the rule that a sufficient consideration only has to consist in some legal benefit or detriment; any reference to particular quantitative and qualitative requirements is superfluous. In that sense, the key consideration rule—consideration needs to be valuable but not adequate—can be consistent and reasonable, contrary to what Fried argues. In this light, Benson argues, the doctrine of consideration provides the second side of a contract, which is normatively necessary to create a legally enforceable entitlement, as contract is always understood as a two-sided in nature.

In order to understand the plausibility of this line of reasoning, reference may need to be made to Benson’s account of transfer theory of contract, where he insists that contract entails a transfer of ownership. Transfer, understood in the most straightforward terms, involves two mutually related acts of wills and two independent parties, thus is always considered two-sided.43

Secondly, Benson argues that consideration is necessitated to bridge a transfer of right from the promisor to the promisee. Let me explain. Benson maintains, at common law, a promise

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43 For a detailed discussion of Peter Benson’s account of transfer theory, please see generally Peter Benson, supra note 2, at 123–205.
should be given along with a request for consideration as *quid pro quo*; in turns, consideration must be given in response to this request. Thus, promise and consideration must posit each other as essential to its own completion, missing either side would not be sufficient to form a mutually related contractual relation. In this sense, consideration provides the co-present element, which Benson considers absolutely necessary to create a contractual relationship. He argues, without the co-present element provided by consideration, the giving of the promised undertaking from the side of the promisor would only be an act of alienation, while the taking of the promised undertaking by the promisee would be merely an act of appropriation of an ownerless object. There would be a gap between the giving and the taking, thus no transfer could ever take place. This is a difficulty created by the doctrine of offer and acceptance, as acceptance, logically, comes after the offer. However, in order for a transfer to take place, both parties’ wills must join at the same time. Consideration fills the gap and joins two separated acts of wills in one coherent sequence. As consideration is always given in response to the request of promisor as *quid pro quo* for the promise, thus consideration and promise can be “construed” as simultaneously, which does not necessarily happen at the same time, but co-present in abstraction from time. The doctrine of consideration allows promise and consideration be the cause and effect of each other, hence they can be considered both temporal successive and co-present in abstraction from time.

Thirdly, as Benson claims, consideration does not only fit and preserve the form of the two-sided relation that is required by offer and acceptance, but also positively provides reference to some conception of the parties’ “wants”, which is the substantial feature of contract (while offer and acceptance, by objective test, only suggest the structural features of contract, that one side must be the reason or the cause of the other side; therefore, offer and acceptance, only negatively, rule out particular interests and motives that are legally irrelevant, but does not contain positive analysis of what is legally relevant. Consideration fills the gap.) Consideration takes two steps to achieve this:
a. Structural requirement: the doctrine of consideration requires that one side (the promise) must be the cause or reason of the other side (the consideration), which, however, does not go beyond the similarly formal analysis of offer and acceptance;

b. Substantive requirement: the consideration should be something that could be reasonably wanted by the promisor. Therefore, it should consist of some legal benefit to the promisor or some detriment to the promisee; this rule specifies the content that one side needs to have in order to be the cause of the other side.

To further this point, consideration in Benson’s account also serves the function of specifying the nature and content of contractual rights and obligations. As I have discussed previously, in Benson’s account of transfer theory, contract transfers ownership. One may ask what kind of ownership is transferred. In my understanding, the nature of the ownership is defined by the doctrine of consideration. Let me start by giving a brief introduction of Benson’s transfer theory.

It is a long-established legal principle that the normal remedy for breach of contract is either expectation damage or specific damage; and that in giving such remedy, the law aims to put the plaintiff in the position that he or she would had been in had the contract been performed. The law takes this “expectation” principle to be a principle of compensation. And expectation damages and specific performance are regarded as expectation remedies.44

In setting out to justify such expectation remedies as compensatory and, as such, to be normative plausible, the transfer theory aims to demonstrate that there is a juridical connection between the contractual remedy and the contractual entitlement, which is sufficiently and exhaustively established by contractual formation.

The transfer theory is conscious that it is confronting a considerable weight of modern contractual scholarship, among which, the most fundamental one is the challenge raised by

Fuller and Perdue. They alleged in their prominent article that expectation remedy gives the plaintiff something that he has never had. They reached such a conclusion by denying that promise as such gives the promisee any contractual entitlement. They claim that “making of a promise does not, in and of itself, give the promise anything that, can count as a protected interests as against the promisor”. They believe that awarding of specific performance and expectation damage is solely desirable on the basis of policy considerations, and deny that promises, as such, have any juridical significance.

As Benson points out, what lies at the heart of Fuller and Perdue’s challenge is a supposition of a generally accepted idea of compensation in private law. Such an idea of compensation supposes two things: firstly, there is an initial baseline that represents a legally protected interests, which the plaintiff has exclusive as against the defendant, prior to the defendant’s wrong; and the other one is that, in case of injury to that interests, the realization of a remedy must begins and ends with the baseline of protected interests. In the particular case of contract remedies, if expectation damages and specific performance are to qualify as such, it must be possible to view them as reinstating plaintiffs in something that is their protected interest and which they already have prior to breach.

Therefore, the transfer theory of contract law attempts to restate and defend the main structure and doctrine of traditional contract law by reference to the juridical significance of contractual entitlement. To put it in the most simplified form, transfer theory seeks to justify that contractual performance is only to vindicate while contractual remedies is to restore what one is rightfully entitled to.

In transfer theory, expectation damages and specific performance are not the “best” or “the most appropriate” remedies for promoting certain moral or social economic goods, rather,
they are the only juridically plausible remedies for restoring the contractual entitlement, no more, no less. This is what fundamentally distinguishes contract law from other departments of law like tax law. Benson, who interprets Hegel and Pufendorf’s theories, formulates the contractual entitlement as a special species of ownership to the object promised. In contrast to the conventional form of *in rem* ownership—proprietary ownership, the contractual ownership on Benson’s account is *in personam* in a sense that it is binding upon the contracting parties only. Such a formulation of contractual entitlement aims to: on the one hand, preserve the transactional characteristics of contract, namely, that the scope of the rights and the object are specified by a mutual agreement and this analysis holds only between the contracting parties; while on the other hand, to set up the strongest normative connection possible between the contractual rights established at the time of contract formation and the performance interests to be realized by performance or expectation remedies.

To elaborate, in Benson’s formulation, the object transferred by contract, namely, the object of the contractual ownership is the thing promised, as opposed to the performance or “the promise itself”, or the other party’s “choice” or “personal freedom”.

The thing promised can be an asset of some kind (including right, privilege, etc.) or a service. To illustrate, suppose I am a party to a contract of purchase and sale of a horse, according to Benson, the object I acquire by the contract is the horse; the horse becomes mine, although such an ownership title is only valid in relation to the other contracting party, the seller. In this sense, the contractual entitlement established exhaustively by mutual agreement is exactly what the expectation remedies compensate—the ownership of the thing promised. Performance does not transfer the ownership of the thing promised (the horse in my previous example), physical delivery by the promisor is simply the way he discharges his duty to honor the ownership right of the promisee.

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As we can see, the object of ownership in Benson’s reasoning is not necessarily of the same nature as the object of proprietary ownership. However, what kind of ownership can exactly be transferred by contract is not clear. In my understanding, the myth lies in Benson’s interpretation of consideration.

In Benson’s article, the doctrine of consideration is used in two contexts. In the first context, the thing promised is regarded as a consideration by itself. In the second context, the consideration refers to “something” requested by the promisor and done or promised by the promisee in return for the promise. So the term ‘consideration’ refers to both the undertaking promised and the undertaking requested as *quid pro quo* for the promise, in a sense they each function as consideration for the other. Supposed A promises B undertaking ‘a’ in request of B’s undertaking ‘b’ as consideration. In order for A’s request for undertaking ‘b’ to be enforceable, undertaking ‘a’ promised by a needs to fulfill all the requirements of the doctrine of consideration; vice versa for undertaking ‘b’. All in all, in an executory contract, the promise and the returned undertaking are consideration for each other; therefore, both of them need to fulfill all the doctrinal requirements of consideration (e.g. nexus, valuable in the eye of law etc). This conception of the content of “promise” is consistent with Benson’s claim that the object of the contractual ownership should be an asset of some kind (including but not limited to corporeal thing). It could be a right, a privilege or a service, so long as it fulfills the requirements of consideration.

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51 *Ibid*, 1721, in the beginning of the first complete paragraph, Benson said: “it is not the promise itself…but the thing promised—that constitute the consideration.”

52 For a detailed discussion on this point, please refer to another paper of the author. Zhuoyan Xie, “Contract as a Transfer: an Theoretical Observation”; unpublished, at page 12. “Benson, conceptualizes the thing promised as the notion of consideration, which seemingly refers to a corporeal thing, but in fact is an abstract and relational concept, that covers anything that is qualitatively identifiable and capable of being externalized for the benefit of others, not only limited to material objects. … In his interpretation, the thing promised needs to be requested by one party and offered to such request by the other; it should be beneficial to one side or detrimental to the other side; and it should be capable of moving from one party to the other. These three features are the normative requirements of the thing promised….as consideration, the “thing” promised does not need to be a corporeal object; instead, it can be anything that is capable of being qualitatively and quantitatively identifiable, anything that is either beneficial to the promisor or detrimental to the promisee, and anything that is capable of being externalized from one’s personality and move from one side to another.”
In this context, the key function of the doctrine of considerations is to impose positive requirements on promised undertakings, which is the object of the ownership transferred through contract. The requirements are:

- As consideration, the promised undertaking need to be mutually inducing in a sense that it should be requested by one side and offered by the other side to the side that requests. This requirement brings out the transactional feature of the object promised, by specifying that the object promised should be directed at by two mutually related wills. This requirement makes contract better fits with the requirement of the transfer of ownership, where the object alienated must be the same one that is appropriated.

- As consideration, the promised undertaking needs to be either beneficial to the promisee or detrimental to the promisor. This requirement brings out the normative substance of the thing promised, which is necessary for qualifying as an object of ownership. The object that could be owned from a legal point of view should be something that is valuable in the eye of law. The doctrine of consideration specifies that the thing promised need to fulfill the objective test that it is something that could be wanted by a reasonable person. The doctrine of consideration excludes “preexisting duty” or “prior obligation” from the things that could be promised in a legally enforceable contract, because that is something already owned by the transferee thus not valuable in the eye of law, nor are they capable of being transferred to the person who already own them.

- As consideration, the promised undertaking must be capable of moving from one side to the other. This requirement specifies that the object needs to be capable of being alienated and appropriated (capable of being externalized from a self-determining agent and be transferred and utilized by another agent), which also conforms to the logic of a transfer of ownership, where the thing transferred needs to be something that is capable of moving from one side to another.
In this light, the doctrine of consideration specifies the normative content of subject matter of contractual entitlement, which is beyond the physical nature of the material object transferred by contract. To be specific, on Benson’s account of transfer theory, the doctrine of consideration specifies the type of ownership and the subject matter transferred through contract, which is not necessarily the proprietary ownership of a corporeal thing, as long as it fulfills the abstract requirements of consideration.

4.4.2 A Critical Review

I consider Benson’s justificatory account of the doctrine of consideration as the most promising one so far, since he is trying to identify the normative significance of the doctrine by trying to identify the underlying coherence from within, instead of justifying it by suggesting something it is not, like the formal and realist approaches do.

In brief, Benson interpretation of the doctrine of consideration can be broken down to four aspects as follows.

Firstly, consideration establishes the second side of a mutual relationship; in order to do that, the doctrine requires consideration and promise to be qualitatively distinct and irreducible to each other. Consideration must be independent from the thing promised, in order to function as a second content that moves from the promisee and is not merely an aspect or a part of the promise.

Secondly, consideration bridges a transfer of ownership by providing the ‘continuity’ element in contract. Consideration must be given in response to and after the promisor’s request in return of the thing promised, so that consideration and promise can be “construed” as simultaneous. In this way, although the two acts of wills (promise and acceptance) do not happen at the same time, they can be considered co-present in abstraction of time. Such a mechanism ensures that the two sides of a transaction are mutually related, consideration and promise posit each other as essential to its own completion.
Thirdly, consideration provides the substantive feature of a contractual ownership transfer by specifying the content of ‘want’ in voluntary contract and by defining the subject matter transferred by contract. The doctrine of consideration requires that the undertaking given as *quid pro quo* for a promise to be valuable in the eye of the law therefore must be something that could be reasonably wanted by the promisor. In this way, consideration maintains and defines the voluntariness of contract in accordance with the objective test. Furthermore, the requirements imposed by the doctrine specify the kind of ownership that is transferred by contract on Benson’s account of transfer theory. The function of the doctrine of consideration abstracts the normative features from the material object promised.

Understood as such, Benson’s account sought to provide truly a justification for consideration that is coherent, normative and consistent with the law in practice; to a certain extent, he is trying to make sense of the doctrine rather than attempting to modify it; so it is immune from some of the criticism facing other justificatory accounts. However, this formulation of the doctrine also contains some difficulties. In particular, it is questionable whether his transfer theory needs the doctrine of consideration in order to function properly.

The first difficulty comes from the notion of “the second side of a contract” and the notion of continuity. As Benson claims, consideration constitutes the second side of a transfer in abstraction from time, which is normatively necessary to establish a legally enforceable contract that combines two acts of wills. Furthermore, it is said that the transfer of ownership needs two mutually related but independent acts of wills to transfer one object. This implies two requirements for contract formation: one is to require that there should be two sides of involvements to substantiate a transfer, one side to alienate and the other to appropriate; the second requirement is that these two sides must be mutually related, they need to refer to a same object. Therefore, the legal enforceability of a contractual transfer depends on whether there are involvements of two wills.
In this light, the doctrine of consideration posits two undertakings in one legal relationship; one must be requested and offered in return for the other. In my understanding, the doctrine of consideration in this context not only requires two objects but arguably two processes of transfer in one transaction in order to substantiate the enforceability of each one. Benson’s interpretation of consideration shows a continuing concern for the juridical plausibility of enforcing a commitment that binds into future. He attempts to show that the doctrine of consideration laid down the source of enforceability. Because, he implies, when a contract is supported by a consideration, the promisor is not the only side that bears an obligation, the promisee also bears obligation, the asymmetry of rights and duty ensures mutual involvement. So in that case, no one has the option to back out. A moral commitment turns into a legal commitment due to the equal involvement of a second side. This logic reflects on the requirement that a consideration must be capable of being externalized from the promisee, and be something that could be utilized and is valuable in the eye of law (capable of moving from one side to the other and be beneficial to the promisor or detrimental to the promisee), it cannot be simply a response from the promisee, like saying “thank you, I accept your promise”. Only by giving, doing or promise something in return, a serious, equal and reciprocal involvement of the second side (the promisee) is established. Benson considers this as the essential elements of a transfer and as the juridical source of enforceability of such a transfer.

As a recent article points out, by trying to justify the doctrine of consideration, Benson calls for an artificial degree of contractual symmetry. Benson does more than suggest that the promisor’s consent must mirror the promisee’s. He calls for a radical balance within the contract: a reciprocal undertaking. In Benson’s words, “Appropriation by the second party

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54 Part of the difficulty for Benson’s theory is that he seeks a non-teleological conception of contract that provides for equivalence of exchange. This is hard to do. There are, of course, well-known alternative conceptions, but not ones that comply with Benson’s purported restrictions. Compare, e.g., James Gordley, “Equality in Exchange”, 69 (1981) Cal. L. Rev. 1587, with Benson, supra note 2, at 43 (describing Gordley’s theory as teleological).
in accordance with continuity implies...that the thing is appropriated *at the same time* the owner exercises his or her right of ownership by alienating it.” In this way, the contracting parties “have at the beginning and at the end of the transaction something that is the same.” The difficulty here is that a contract requirement of simultaneous ownership of one and the same thing is counterintuitive. Although one may choose to think of transfers in terms of mutual ownership of the exchanged property, it is unclear why this mutual ownership should be considered part of the logic of transfers generally.

The second difficulty arises from the abstract idea of “want”, which Benson believes to be latent within the doctrine of consideration and necessary for justifying contract as a whole. He seems to suggest that a tentative link may be discerned between the concept of a voluntary contract and the doctrine of consideration. It could be argued that a voluntary agreement necessitates the existence of a reciprocal relationship. The very concept of voluntariness seems to legitimatize the common law’s insistence on conditioning the enforceability and validity of a promise upon the provision of a returned undertaking. 55 This needs not be a flaw. However, Benson is seeking to justify the doctrine without making use of external, non-normative justifications. 56 But if we are to consider the requirement of consideration as a way that law seeks to single out transactions that suit collectively determined policies, contracts would be based on an external or distributive basis. So the biggest issue with Benson’s theory is to delineate an idea of “want” that is content-neutral, which is difficult.

Another difficult question is whether the co-existent element that Benson claims to be provided by consideration is indeed needed. As Benson argues, such an element is needed to bridge a transfer since two acts of wills, which physically, always comes after the other thus is different in time. However, it is arguable that this co-existent and simultaneous problem

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56 See Benson, *supra* note 2, at 123, (“[Contract theory] should also investigate whether there is an interpretation of contractual fairness that fits with the apparently non-distributive aspects of contract.”).
have already been solved by the objective test of offer and acceptance: if a reasonable person believes that offer is accepted, then contract is found regardless of subjective regrets. The ‘mirror rule’ and the ‘objective test of offer and acceptance’ seem to have already solved the potentially fictional difficulty envisioned by Benson. Just like shaking hands, regardless who shows hand first and regardless of whether one person wants to take back the hand in the mean time, as long as handshake takes place, both parties can reasonably believe that wills are joined.

The last difficulty arises from the two main proposals raised by Benson. Firstly, Benson has resisted Fuller and Perdue’s conceptualization of consideration as a formality requirement, because that conception does not explained the normative significance of the doctrine of consideration. Benson believes that the doctrine of consideration defines the two-sided character of contract, while formality only signifies the involvement of only one side. To illustrate, formality equates the consideration with a seal stamped by the promisor on the letter of offer to transfer the thing promised to the promisee, hence it does not reflect or care about the normative status of the other side, nor require the involvement of the promisee. So in Fuller and Perdue’s interpretation, a contract supported by consideration is still a one-sided commitment. But according to Benson, only when two sides are juridically involved, can a contract qualify as a transfer of ownership. However, considering consideration as a formality does not qualify contract as a transfer. Secondly, Benson has also rejected the idea that the doctrine of consideration requires contract to be a transaction of equal exchange or bargain. It is true that the doctrine of consideration requires something to be requested and given as quid pro quo of the promise, and that something needs to be of value in the eye of law. However, in Benson’s interpretation, the doctrine does not impose a quantitative requirement on the thing given as quid pro quo to the promise. To the contrary, the doctrine of consideration never imposes that consideration should have certain particular content or value; it only requires that the consideration should be beneficial to the promisor or detrimental to the promisee in a legal sense. For example, as a quid pro quo of the sale of a
horse, a peppercorn would suffice if it could be justified as valuable in the eye of law. The doctrine of consideration does not require that the thing requested in return of the thing promised to be of larger or equal valuable. The doctrine of consideration only ensures that the promise and the consideration represent two sides originating respectively with the two parties.

However, these two proposals are potentially conflicting; by not requiring equivalence in value, consideration looks like another type of formality. It only refers to an idea of reciprocity, which could be understood as merely an ostensible synallagmatic requirement. Instead of the type of formality suggested by Fuller and Perdue which equals a request for consideration with a seal stamped by the promisor to show the promisor’s commitment to be bound, the type of formality implied by Benson is like a seal stamped by the promisee to show the promisee’s serious involvement. While the former implies a belief that “contract is created by the promise made by the promisor”, the later, seems to embrace the idea of “equal participation” that looks like an ostensible synallagmatic requirement). To illustrate, in case of a contract for sale and purchase of a horse, according to Fuller and Perdue, the contract to transfer the horse from the promisor to the promisee is enforceable only when the offer to sell is under seal stamped by the promisor or when the promisor requests something (anything regardless of value and quantity) in return for the horse. The promisor could have only requested a peppercorn in return; the function of the peppercorn is to signify the promisor’s serious intention to be legally bound. In contrast, according to Benson, the transaction of transferring the horse is enforceable only when the promisee also promise something (anything regardless of value and quantity) requested by the promisor as *quid pro quo* of the horse, a peppercorn would suffice. The peppercorn on Benson’s account is to establish the second side of the transaction (which looks like merely an ostensible synallagmatic requirement). When the promisor’s promise signifies the will to alienate the ownership of the horse, the peppercorn manifests itself as the promisee’s will to appropriate it and to legally bind the promisor to his promise. In this regard, Benson’s peppercorn is no more than a
formality that signifies the seriousness of the promisee’s will to appropriate the horse. Besides that, there is no intrinsic value of the doctrine of consideration. Therefore, it would be in conflict with Benson’s claim that the doctrine of consideration is more than just a formality.
V. The Two Main Understandings of the Doctrine

In the previous section, I have reviewed the major justificatory accounts of the doctrine of consideration. In this section, I will present my understandings of the key factors that lead to the divergence of different justificatory accounts. In my opinion, there are two understandings of the doctrine of consideration. The first one — the teleological approach, focuses on the enforceability of an agreement or a promise, thus considers the doctrine of consideration as an artificial requirement that filters certain relationships that are otherwise perfectly binding. In contrast, the other understanding, the non-teleological approach, emphasizes the validity of contract by interpreting the doctrine of consideration as an indispensable ingredient of a juridical relationship; without consideration, there would be no legal relationship at all. The difference between the two understandings is often neglected. However, I consider it important. In my opinion, the difference leads to two completely different justificatory approaches.

5.1 The Teleological approach

The first understanding understands the doctrine of consideration as an artificial limits on the enforceability of agreements that are otherwise legally binding. The view, at one time, puts forward that consideration only evidences the parties’ intention to be bound, and that such evidence could equally be furnished in writing, or by other forms of formality. This view raises the possibility that a donative or gratuitous promise constitutes a valid contract; it is simply because of policy reasons that these contracts are not enforced. Accordingly, the purpose of the doctrine of consideration is to reflect these policy concerns. Consideration exists to prioritize certain moral relationships over others. To the teleological theorists, there is no normative distinction between ethical and juridical relationships. The justifications for the doctrine of consideration from the standpoint of this view are diversified in such a way that they treat consideration as an umbrella doctrine, which plays a multifarious role and does

not need to have a significant normative value of its own. As I have discussed in the previous section, the paradigmatic theories of this approach are Fuller’s formal justification and Atiyah’s realist rationale for consideration. Fuller contends that the doctrine of consideration functions as a substitution for legal formality to single out agreements in order to achieve certain social economic goals. While Atiyah argues that the doctrine of consideration is an umbrella concept that aims to function in a way that its normative features suggest otherwise. However, such a view might have misplaced the emphasis, since this approach only focuses on what is merely contingent and incidental to the doctrine’s operation and misses out what is normatively pertinent. And such an understanding of the doctrine will inevitably lead to inconsistent and unstable application of the doctrine. Overall, this approach will not be able to meet the challenge posed by Fried.

The teleological theorists investigate into the sources of obligations, and keep asking “whys” and usually come up with random non-normative reasons that are vaguely defined or simply taken for granted (such as virtues, efficiency, welfare maximization, or autonomy)\(^{58}\), rather than searching for a normative basis that is immanent within legal reasoning or for the normative features that characterize legal relationships. Since they focus on the end instead of the basis, teleological theorists usually criticize the formalistic theorists on the ground that ‘rights’ is a tautological concept which does not explain why some choices are enforceable while others are not. In the following section, I will explain why such a criticism is unfounded.

\(^{58}\) The paradigmatic examples of the teleological approach are the reliance theory suggested by Goetz & Scott, Atiayh, and Fuller & Perdue, the efficiency theory proposed by major law and economic scholars like Posner and the distributive approach of Kronman. This categorization is not meant to be exclusive or exhaustive, they might contain significant overlaps. They all consider contact as based on distributive policy considerations for the sake of promoting certain social, economic or moral goods. In that respect, contract law departs from corrective justice and becomes indistinguishable from tax law. These approaches fail for a number of reasons, mainly being not able to provide a stable normative baseline for contractual liabilities or being in tension with the basic ideas of private law, which includes the respect for self-determining freedom and individual entitlement. See L. L. Fuller & William R. Perdue, Jr., “The Reliance Interest in Contract Damages”, 46 Yale L.J.52, 52–53 (1936); C. Goetz & R. Scott, “Enforcing Promises: An Examination of the Basis of Contract” (1980) 89 Yale L.J. 1261; P.S. Atiyah, Promises, Morals, and Law (New York: Clarendon Press 1981); Richard A. Posner, Economic Analysis of Law, 7th ed. (New York: Aspen Publisher, 2007); also see A. Kronman, “Contract Law and Distributive Justice” (1980) 89 Yale L.J. 472.
5.2 The Non-Teleological approach:

The second understanding of the doctrine considers consideration as a substantive constituent of a valid contract. According to this formulation, consideration, no less than offer and acceptance, is a general requirement of contract formation, the absence of which renders an agreement *void ab initio*. This view suggests that the doctrine of consideration has an intrinsic value of its own, which cannot be substituted by other doctrines or policy rules, like formality. The main task of this approach is to identify the distinctive and coherent normative features of the consideration rules. This is what Benson’s transfer theory is trying to do, despite the difficulties mentioned above. In my opinion, by comparison to the first approach, this one is much more promising in meeting the challenges posed by Fried.

It is worth noting that Benson’s account is not trying to provide answers to every question arises from the law. The value of legal theory is to provide a way of thinking and a critical perspective to analyze potential questions. It should also be noted that distributive notions like virtues, equality and private autonomy are not necessarily incompatible with Benson’s formalistic approach. In fact, Benson seems to believe that they play a normative role in explaining legal relationship. However, he does not consider them as some sort of substantive ends that contractual law needs to fulfill. He inquires into the conception of legal relationships, by asking what distinguishes a juridical relationship from moral ones (he attempts to accomplish this step by examining the most fundamental legal relationship—property); and then he asks how contract doctrines embody such a conception (in this step, he begins with the less controversial doctrines—offer and acceptance and then moves on to analyze the doctrines of consideration and unconscionability to see how such a conception can make sense of the rules of these doctrines).\(^{59}\) He suggests, after a comprehensive review of contract law, juridical relationship features ideas like ownership, freedom and equality. However, these ideas come at the end of the analysis, rather than as the assumptions that he starts from.

\(^{59}\) See generally, Benson, *supra* note 2.
At this point, I shall discuss the theory of legal formalism, which was firstly advanced by Ernest Weinrib and is followed by Benson with some variations. Legal formalism emphasizes the juridical conception of law. It aspires to achieve conclusiveness and consistency and suggests that the integrity of law should be and can be upheld in its own justificatory process. As a theory of private law, it is illuminating as it explains and adds normative dimensions to the fundamental principles in private law. It seeks to understand a practice of law by its internal characteristics instead of external considerations. It always works backward from the doctrines and institutions to the most pervasive abstractions implicit in it. The arguments move from private law as a normative practice to its presuppositions, which then serve as vehicles of criticism and intelligibility that are internal to the practice. Legal formalism seems like a promising approach to understand private law as it explains the law as what it is. The validity of its reasoning does not depend on the correctness of those external considerations and the ultimate destination of its justificatory process is coherency and unity, which is generally determinate and predictable. It assesses the normative characteristics of a legal practice not by questioning or denying its validity right from the beginning, which is often the approach of teleological theories. In contrast, legal formalism reflects the justifications internal to liability in private law, treating them as normative in their own terms rather than as the disguised surrogates of extrinsically justifiable social goal. Thus, it honours the law’s reasoning as a good faith attempt. Accordingly, law retains its normative status with autonomous values and is considered capable of upholding integrity of its own.

In contrast to legal formalism, as Weinrib discussed in his book The Idea of Private Law, teleological theorists do not believe that law is an autonomous realm of reason. They tend to think that moral relationships acquire legal status because they serve a purpose that is morally correct or desirable from an instrumental standpoint. Freedom is one of the many ends that

62 Ibid.
63 Ibid.
law should serve. In particular, teleological theorists are sceptical about the ideas of rights or entitlement.

However, to legal formalism, the concept of rights is comprehensive, unifying, and systematic. Law cannot be understood without it, since right encompassed everything from the operation of will to substantive legal doctrines and institutions. Without the concept of rights, law would be merely an empirical phenomenon: like a wooden head, beautiful but brainless, it would lack inner intelligibility. As Weinrib said ‘Although we are willing to invoke rights and to subject them to formal Hohfeldian analysis, we shy away from Kant's notion of a single concept of right that is presupposed in law and articulated through law. At most, contemporary legal scholarship postulates—but does not elucidate the foundations of—the generic power of right to trump utilitarian considerations.’

As we can see, legal formalism is heavily drawn on Kantian and Hegelian philosophy. Kant seems to believe that formal considerations, applied with a scrupulous attention to avoiding contradictions, can generate substantive conclusions. Kant presents law as lean, minimal, and self-contained. It has a necessary and universal content that lifts it above the emptiness of positivism, and yet this content is not fissured by the internal tensions considered inescapable by today's radical critics. Kant sees law as a coherent ordering of purely external relationships among moral persons, and he undoubtedly would agree that this ordering can be grasped without reference to any of the modes of analysis (economics, ethics, literary criticism, and so on) that dominate current legal writing. Kant held that one could understand law only by grasping, as he put it, the practical reality of law being an idea of reason. To put it in a more straightforward way, legal formalism believes that law has its own rationality; therefore, it could be understood on its own concepts, doctrines and structure. It is wrong to think that “wills” or “substantive social and economic ends” are the basis of law. Let me elaborate.

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65 Ibid, also see, Immuel Kant, The Metaphysics of Morals (Mary J. Gregor trans., Cambridge Univ. Press 1996) at 41 [6:252].
5.2.1 Autonomy

In my understanding, the principle of autonomy is valued, among others, by Benson’s account as a fundamental characteristic of juridical relationship. However, the idea of autonomy has been obfuscated by the will theory proposed by Fried, which considers the wills of the parties as the source of their legal rights and duties.\(^{66}\) And it follows that law must concern itself solely with the actual inner intention of the promisor; the minds of the parties must “meet” at one instant of time before a contract can result; the law has no power to fill in an agreement and is helpless to deal with contingencies unforeseen by the parties. Understood as such, will theory cannot explain why the promisor is not free to change his mind after contract formation. This consequence makes the will theory unacceptable. But this is the problem of the will theory, not the problem of the autonomy principle. Specially, the principle of autonomy does not inquire into the actual, inner bee of individual legislators. The law does not hesitate to fill gaps in defective statutes. The principle of private autonomy, properly understood, is in no way inconsistent with an “objective” interpretation of contracts. It has been suggested that in some cases the court might properly give an interpretation to a written contract inconsistent with the actual understanding of either party. The will theory has phrased the autonomy principle too narrowly. In contract, the parties not only make private laws for themselves, but also for their fellows. I do not refer here simply to the frequent existence of a gross inequality of bargaining power between contracting parties, or to the phenomenon of the standardized contract established by one party for a series of routine transactions. Even without excursion into the social reality behind juristic conceptions, a principle of private heteronomy is visible in legal theory itself, as, for example, where it is laid down as a rule of law that the servant is bound to obey the reasonable commands of his master. Here the employer, within the framework of the agreement and subject to judicial veto, is making a part of “the law” of the relation between himself and his employee.

Then what is left to private autonomy? The fact that the principle of private autonomy is recognized does not mean it should be given an unlimited application. Law makings by individuals must be kept within a proper sphere. Therefore, the will theory is in contradiction with legal formalism, as it does not distinguish wills that are normatively relevant and those that are not.

The basic unit of formalist analysis is legal relationship; law connects one person to another through the ensemble of concepts, principles, and processes that comes into play when a legal claim is asserted. If, for instance, the claim is for breach of contract, the legal relationship between the parties is defined by the doctrines and concepts of contract law and by its accompanying procedures of adjudication. That is why legal categorizations matters profoundly in formalism, categorization defines normative relationship, specifies the features, elements, structure of normative relations, and excludes relations that are not normative. Legal categorization implies a heteronomy-like phenomenon in private law, although, it is in fact an embodiment of individual autonomy. If one cannot avoid living side by side with each other, their actions need to be viewed objectively and formally, regardless of individual, contingent purposes. Free and autonomous persons are considered by law as reasonable beings that are capable of presenting their will through a universal law.\(^67\) So when free persons interact with each other, their autonomous wills are channelled through a defined framework and an ensemble of legal concepts. However, the will theory, interpreted by Fried, does not distinguish between wills that are normatively relevant and those that are not; as it believes, the subjective intention of individuals should be the sole determinant of their legal relationship. Along that line, Fried criticizes that consideration artificially trumps freedom of contract by prioritizing exchange. This criticism is unfounded because it misunderstood both consideration and the normative idea of freedom. The role of consideration is to preserve the defined normative framework made in accordance with freedom and autonomy by validating

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\(^{67}\) Ibid.
only wills that are normatively relevant; and consideration does not seek to prioritize exchange, as it never inquires into the value of the reciprocal undertakings.

In contrast, Benson’s account of transfer theory, which follows the formalistic approach, differs fundamentally from the will theory. Implicit in Benson’s reasoning, only those wills that conform to a certain normative structure are relevant in determining the rights and duties of autonomous individual in their interactions. The normative structure needs to embody rationality or coherence. Along this line, Benson tries to show that there is a rational structure immanent in contract law as we know it. This structure, he believes, is captured by the idea of reciprocity and mutuality.

5.2.2 Reciprocity and Mutuality

Benson claims, following Ibbetson, the essence of the idea of consideration is that it should be something given (loosely) in exchange for the promise, regardless of the relative value of the consideration in respect to the promise. This is the idea of reciprocity and mutuality in contract. 68 Reciprocity and mutuality challenge the proposal that ‘the cause of the action was the promise, not the consideration’. The purpose of consideration is not to evidence the promise or the seriousness of the promise but to form an equal part of a normative relationship between contracting parties. The purpose of consideration is to show that there is a situation of reciprocity between the parties, just as was the function of quid pro quo in the action of debt. The promise and consideration are parts of a single synallagmatic transaction, and each had been given in exchange for the other. 69 The claim that contract is two-sided, not basing on one-sided promise appears most strongly through the doctrine of consideration. When consideration was provided, the promise becomes irrevocable; this is drawn between

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68 The only exception is when the consideration and promise had some fixed value with respect to each other; in this case, it might be urged that the court should examine the sufficiency of the consideration. (e.g. Pillesworth v. Feake, exchange of English and French currency; or the promise of a loan, then the consideration should be paying back a greater value: Longe v. Stransam)

bilateral and unilateral acts. A defendant was liable because he had not performed his side of the agreement, and not simply because he had not performed his promise.

Consistent with Benson’s interpretation, in The Idea of Private Law, Weinrib also attempts to explain the doctrine of consideration by reference to ideas of reciprocity or bipolarity. The principal function of [consideration] is to capture the bipolarity of the contractual relationship by affirming the promisee’s participation in the right to the promisor’s performance. The doctrine also reflects the unity of the parties’ relationship: promise and consideration are not bounties unilaterally volunteered to each other; rather, the consideration is something that the parties understand to be given in return for the promise. Furthermore, the doctrine of attests to the equality of the contracting parties, since it requires both parties give tokens of their wills and thus participate as equal agent in the creation of the contract.

To form a valid contract, there are three possible relations between promise and consideration: simple exchange, mutual promises, and past consideration that could be shown to be part of the same transaction with the promise.

In case of simple exchange, promise is given for a completed act. The promise is not actionable before consideration is performed. It is the most straightforward type of contract; promise was ‘given for’ or ‘in consideration of’ the performance of some act by the promisee.

In case of mutual promises, consideration was expressed as a promise to perform. This kind of contract was accepted as legitimate without great difficulty. In such a case, promises are actionable independent of each other (the defendant could be held liable notwithstanding that he had not in fact received any substantial benefit, and plaintiff has a claim though he did not suffer any actual detriment.)

Past consideration is generally rejected as good consideration. The rule against past consideration is a substantive rule stemming from the idea of reciprocity, rather than a purely formal requirement. It follows that, if sufficient reciprocity could be shown, the promise

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70 Weinrib, supra note 60, 137-138.
should be enforced notwithstanding that, formally speaking, the consideration was past. Therefore, an ostensible past consideration would be sufficient to ground an action if there was some other evidence that the promise and consideration had been intended all along to be parts of the same bargain.\textsuperscript{71} As Ibbetson said, ‘It is only in terms of a theory of mutuality that the admissibility of courts grounded on the performance of a precedent act at the request of the defendant can be understood. The request is important solely because it was evidence that there was sufficient synallagmatic elements’. \textsuperscript{72}

Benson seems to have rightly identified the notion of mutuality and reciprocity as the most pervasive feature of contract, thus justify the doctrine of consideration as an indispensible part of contract law on a descriptive legal. However, he did not quite explain the deeper implication of mutuality and reciprocity. Up till now, our reasoning does not go beyond description. As I have discussed, formalism’s interests are in the internal structure of legal relationships. The relationship’s components—its various doctrines, concepts, principles, and processes -- are the parts intertwined to one another and to the totality that they together form. The formalist concern with the structure of a legal relationship is, therefore, a concern with the connection between justificatory considerations. The formalist approaches legal relationships by first discerning their necessary conditions, their internal principles of organization, and their presuppositions.

Although description is the most important process in delineating the normative features of legal relationship in accordance with legal formalism, if we keep looking for the subconscious preconceptions of lawyers who moulded the primary rules, we might ask, why the idea of reciprocity is so important. I believe it is worth exploring the underlying philosophy behind the idea of reciprocity.

\textsuperscript{71} Ibbetson, \textit{supra} note 69, 91. \textit{Hunt v. Bate} 1568 and \textit{Shidenham v. Worlington}: “past” consideration will be allowed whenever the antecedent act had occurred at the request of the defendant. All that was necessary was that the act should have been performed in the contemplation of some payment.  

\textsuperscript{72} \textit{Dogget v. Dowell}: in every action on the case on assumpsit there must be a mutual good turn, and if there is no mutuality, there is not sufficient to maintain an action upon it, for there was no mutual request.
5.2.3 Corrective Justice and Equality

Aristotle posits corrective justice as the unifying basis of private law. And this notion is recognized by legal formalism. Corrective justice consists in the equality of all individual in their interaction with one another. Corrective justice comes into play both in involuntary and voluntary interactions. Both Weinrib and Benson have discussed the idea of corrective justice. The two accounts are generally identical with their emphases slightly different.

Weinrib’s account is more focused on involuntary interactions. In involuntary interaction, which is usually the case of torts, the defendant upsets this equality by imposing a loss upon the plaintiff that is correlative to his own gain. Through liability, the plaintiff seeks a remedy that restores a relation of equality between the parties and so undoes the wrong. Aristotle is primarily concerned with structure rather than with substance. He presents corrective justice in mathematical terms, as equality between two parties to a bipolar transaction. In this interpretation, the bipolar structure of corrective justice represents a regime of correlative right and duty, with the disturbance of equality in Aristotle account being the defendant’s wrongful infringement of the plaintiff’s rights. Since corrective justice conceives of wrongs and remedies as relational, it captures the correlativity of private law relationships and reflects our experience of private law. Moreover, by denying the relevance of one-sided considerations such as the defendant’s wealth or the plaintiff’s need, corrective justice excludes those considerations that lack relevance in the relational world of private law.73

So how is corrective justice relevant in voluntary interaction? Benson has an interesting insight. He claims, corrective justice involves comparison of an individual’s holdings at the start and at the end of interaction with each other and the comparison is arithmetic.74 Both voluntary and involuntary interactions require arithmetic equality. In both kinds of transactions, a person’s holding is presupposed at the start and is potentially affected in and

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73 This account of Aristotle’s answer to the first taxonomical question draws on Ernest J. Weinrib’s Corrective Justice in a Nutshell (2002) 52 U.T.L.J. 349.
through interaction with another, (the only difference is that in voluntary transaction one or both parties acquire something whereas in an involuntary transaction, they do not). Therefore, rectification is, but only one of the functions of corrective justice. So the element of wrong or loss is not necessary for corrective justice to come into play. In this light, there is no need to refer to more than one individual in terms of comparison (unlike in case of involuntary interaction), although no more than two individuals are presupposed in an interaction. Comparison is made between the initial holding and the result. Therefore, even in voluntary interaction, no one is supposed to be giving up something for nothing. The doctrine of consideration provides the equality element by requiring ‘both parties give tokens of their wills and thus participate as equal agents in the creation of the contract’.75

Moreover, the requirement ‘valuable in the eye of the law’ specifies the voluntariness of the contracting parties. Such a value, vaguely, makes reference to the purchasing power of each party. Unlike teleological theorists, who believe corrective justice aims at preserving existing distribution,76 Benson argues that equality in interaction is intelligible by itself; it does not have to be equality in exchanged value. Benson’s interpretation of equality does not impose substantial requirements on the actual value of consideration; a synallagmatic transaction would suffice. While, the teleological interpretation, does inquire into the actual value of consideration. In a reciprocal relation of choice no account at all is taken of the matter of choice, that is, of the end each has in mind with the object he wants; it is not asked, for example, whether someone who buys goods from me for his own commercial use will gain by the transaction or not. All that is in question is the form in the relation of choice on the part of both, insofar as choice is regarded merely as free, and whether the action of one can be united with the freedom of the other in accordance with a universal law. The idea of equality, understood in this light, explains the rules of consideration, which requires only an ostensible exchange but does not inquire into the actual value exchanged.

75 Weinrib, Idea of Private law, 137-38.
76 James Gordley.
5.2.4 Possession

Furthermore, as Weinrib claims, the equality of corrective justice is the abstract equality of free purposive beings under the Kantian concept of right. Contractual right is one form of external freedom on Kant’s account. In addition, the concept of possession is closely related to external freedom. According to Kant, “the subjective condition of any possible use is possession.”\footnote{Kant, \textit{supra} note 65, at 37[6:245].} That is why all forms of external freedom are described in possessory terms by Kant, property rights refer to the possession of corporeal objects, contract rights refer to the possession of another person’s deeds, while status rights refers to the possession of another person that is not fully consensual but consistent with the innate freedom of him or her. These forms of possessions on Kant’s account is an exhaustive list of all possible ways to rightful influence the choices of another person, which we call rightful interactions.

One thing that distinguishes transfer theory from the will theory is how it emphasize the idea of possession—rightful control. Transfer theory recognizes that possession is an essential form of external freedom. Mere wills, even those that are externalized, only demonstrate superficially an external relationship; wills do not explain why some choices are legally enforceable while others are not. Therefore, transfer theory imposes an additional requirement of externality in order for certain acts of wills to be normative—meaning some sort of external control—that could be interpreted in some way as possession of an external object. In contract, the future act of the promisee is the subject matter of choice. This additional requirement of externality, according to Benson, is to be fulfilled by the doctrine of consideration. Benson seems to believe that the giving of consideration shows some sort of control over the performance of promise—which amounts to saying “giving something on my part shows my taking possession of something that belongs to you”. I have to admit that this is a mysterious argument. But I can see a good faith attempt to demonstrate a juridical relationship in light of the idea of possession. Benson needs to answer further questions as to why consideration performs such a function and why it is adequate.
All in all, the non-teleological approach, which the transfer theory took, tries to demonstrate the reasons why the doctrine of consideration is needed to create a juridical relationship that immediately carries the power of coercion. Such a juridical relationship has to embody the ideas of autonomy, equality, reciprocity and possession.
VI. Conclusion

The question is what the normative basis of the doctrine of consideration is. This paper attempts to identify this basis by critically reviewing the major justificatory accounts of the doctrine. The doctrine of consideration has been controversial. Some theorists said that consideration is necessary to contractual liability either on teleological grounds or in a sense that the law postulates an intrinsic link between the requirement of consideration and the enforceability of the wholly executory contract according to the expectation principle. On this view, consideration is definitive and distinctive of contract. However, over the last several decades scholars have repeatedly criticized the doctrine of consideration as artificial, unnecessary, internally inconsistent, or dysfunctional—in short, as an historical accident without rational foundation—to the point that some have reached the conclusion that contract law’s rationality and moral acceptability would be enhanced by its abolition.

In this paper, I have not only reviewed the standard criticism of consideration posed by Fried but also the main justificatory accounts for it. In my opinion, there are two understandings of the role of the doctrine of consideration. The first understanding focuses on the enforceability of an agreement or a promise, thus considers the doctrine of consideration as an artificial requirement that filters certain relationships that are otherwise perfectly binding; in contrast, the other understanding emphasizes the validity of contract by interpreting the doctrine of consideration as an indispensible ingredient of a juridical relationship; without consideration, there would be no legal relationship at all.

As the most comprehensive account of the non-teleological justification for the doctrine of consideration, Benson’s transfer theory tries to provide a justification of the doctrine of consideration by taking its main orthodox features seriously. And his approach is formalistic, not teleological. It does not investigate into the “reasons” for creating entitlement, but firstly delineates the normative features of a purely juridical relationship and starts from there to see whether consideration embodies those features. In Benson’s words, “Throughout, our inquiry
is guided by the idea of a public basis of justification.’ By public basis of justification, he meant a theoretical goal to develop a justificatory framework of contract that is not only coherent but also framed to be acceptable, as a matter of reason and principle, to individuals considered as legal or political personae. In my understanding, the transfer theory identifies autonomy, reciprocity, and equality as the characterizing features of contractual relationship. It claims that consideration is necessary to constitute a kind of normative relationship. It serves as an objective test for a transfer by specifying the features of a transfer: two-sided, reciprocal and mutual relationship; parties interacting with each other as equals in accordance with the principle of corrective justice; the right holder must demonstrate the kind of control as owner of the object transferred.

However, some potential challenges could be raised against the transfer theory. As Benson claims, he defends the doctrine of consideration mainly by demonstrating that it shares the same plausibility and justification with other doctrines of contract formation. Thus he has only proved consideration’s compatibility with other parts of contract law. However, how do we know whether consideration is necessitated and sufficient to establish a juridical relationship? Is Benson’s argument only one of the incomplete good faith attempts? These questions have to be answered by Benson. The aim of this thesis is to raise these questions with a view to understand the doctrine of consideration in a more comprehensive way.
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